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ABSTRACT

One premise of the Brown v. Board of Education Supreme Court decision was that racial injustice could be eliminated through court ordered desegregation. Twenty-three years after Brown I, segregation continues to be one of the most complex issues confronting the country. The failure to distinguish between means (busing school children) and ends (school desegregation) has caused Americans to ignore the goal to which they are legally committed: the education of all their children. Although progress has been made since 1954, a number of more recent court cases illustrate the problems and complexities of school integration. Some decisions, such as Green v. County School Board (1968) and Swann v. Charlotte-Mecklenburg Board of Education (1970), rather than facilitating desegregation, actually increased litigation by raising more questions than they solved. The confusion and ambiguities arising from past court decisions indicate that segregation will continue to be one of the nation's more pressing problems in the years to come. (Author/GC)

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DESEGREGATION: FUTURISTIC CONSIDERATIONS

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DESEGREGATION: FUTURISTIC CONSIDERATIONS

> School desegregation is today the most fervently debated of educational-policy issues. While that has been intermittently true for the past quarter-century, the focus of the desegregation discussion has shifted. Until recently there was broad concensus, at least within what might be called the enlightened community, that racial justice could be secured only through desegregation and that the courts were the one institution fit (or at least willing) to attempt that task. But as the effects of desegregation began to be felt in the North and West, what was previously taken as a given has now become a source of conflict.[1]

The contemporary judicial landscape is cluttered with school desegregation decrees, many of which are enmeshed in controversy. Both liability and remedy questions persist, and new issues constantly emerge as the courts pronounce more desegregation orders.

For the past two decades, the opening of public schools has been the occasion of tension and often violence for many school districts constrained to implement desegregation orders. Not surprisingly, some twenty years later, a sharply divided Supreme Court has appeared to waver on and even partially withdrawn from the inevitably controversial task of implementing the Brown decision. As Judge J. Skelly Wright has written, "One of the remarkable aspects of the Brown case is that it challenged the notion that segregation may be compatible with equality in the context of an institution at the core of the American way of life."[2]

The point is, the United States, traditionally considered the protector of individual freedom, remains in turmoil as it struggles to make educational opportunities a reality for minority group members shut off from the American dream. Even as those of good will continue to press for the implementation of the Brown decision, others continue to argue the wisdom of adding educated minorities.

The Historical Perspective

It provides some perspective, if little comfort, to recall that resistance to segregation (a significant precursor to drive toward integration) hardly started with the Brown decision. It weaves through the historic fiber of this country even before the abolitionists and Abraham Lincoln. Addressing this historical hostility to segregation, a number of articles and studies have raised the question of whether "we are going to continue to move toward two separate societies or to begin to learn to live and to grow together in the development of a truly multi-racial society.[3]

The article just quoted does not address the effectiveness of desegregation in this country; rather it analyzes a selected number of cases in an effort to speculate on the future of desegregation in America. In this article, I will examine four selected desegregation cases. But I will preface this examination with an historical perspective on desegregation litigation in this country.

One perhaps naive premise of the Brown v. Board of Education decision was that racial injustice could be eliminated through desegregation directed by the courts.[4] Still, twenty-three years after that Brown I decision, segregation continues to be one of the most (if not the most) disturbing and complex issues confronting the country. Since Brown, the roots of segregation have not changed - - only the deceits by which it is effected. The current deception is called "the issue". The failure to distinguish between means (busing school children) and ends (school desegregation) has so exercised this country that Americans

have ignored the goal to which they are legally committed - - the education of all its children. Never before in the history of American public education, has an issue evoked as much furor as the present controversy over school busing; but

> busing is not now and never has been the issue. It has only been used as a subterfuge to cloud the real issue, which is: Are we going to continue to move toward two separate societies or are we going to begin to learn to live and to grow together in the development of a truly multi-racial society?[5]

In retrospect, one sees that when the Supreme Court ruled that segregating school children on the basis of race was unconstitutional, the Constitution changed much more significantly than the schools. In practice, the decision failed, as Brown II[6] (1955) did, to inspire reform in the schools with all "deliberate speed."

Until the passage of the 1964 Civil Rights Act, the adherents of integration followed the strategy of dynamic gradualism - - circumventing the laws they considered unjust with acts of civil disobedience in order to build the rationale for legal and judicial intervention. For their part, the enforcement agencies responded to noncompliance with the Brown decision only half heartedly and belatedly. This is not to say that no progress has not been made in law enforcement since 1954, only that those who viewed the Brown decisions as the end to segregation assumed far too much.

The Beginning

The decision set forth in Plessy v. Ferguson,[7] which upheld a Louisiana statute permitting separate educational facilities for Blacks and whites as long as they were in fact, "equal". While bound by this

rule, the court in Sweatt v. Painter[8] examined whether intangible educational benefits were equally provided to both races. The Sweatt case served as MENE, MENE, TEKEL, UPHARSIN[9] for those who championed segregation that the wall separating the races educationally would soon crumble.

Segregation in public schools lost ground on May 17, 1954, when the United States Supreme Court consolidated four cases from the states of Kansas, South Carolina, Virginia, and Delaware[10] raising a common issue into Brown v. Board of Education. In an oft cited paragraph, the Supreme Court construed state-imposed segregation of Black and white students in public schools as unconstitutional. Speaking for the Court Chief Justice Warren said, "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[11]

Once the Supreme Court interpreted the equal protection clause of the Fourteenth Amendment as prohibiting state-imposed segregation, the Court was faced with implementating its decision. One year later, the Supreme Court handed down a unanimous decision that addressed the implementation of the mandate set it forth in Brown I. The implementation decision is known as Brown II.

Reform Since 1964, the Courts, and Dynamic Gradualism

During the years following Brown II the Supreme Court refrained from active involvement in the desegregation process; rather it relied on the lower courts to bring about desegregation with all "deliberate speed." The Court further charged school boards with "the affirmative duty to

take whatever steps might be necessary to eliminate racial discrimination 'root and branch'."[12] But concerned with the slow rate of progress, the Court, on May 27, 1968, rendered a decision in Green v. County School Board [13] that set the stage for a new era in school desegregation.

In Green the court first adopted the percentage of black and white students attending a given school as the primary indicator of whether a desegregation plan had been effective in achieving a unitary nonracial school system.

But instead of reducing the number of desegregation cases, the Green decision actually increased the litigation as school systems began to avail themselves of the loopholes that decision created. The loopholes I speak of appeared when the Court failed to define what a working desegregation plan would entail or what the specific characteristics of a unitary school system were. The ambiguity surrounding these two points perpetuated confusion and further litigation.

Not until June 29, 1970, did the Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education address some of the complex problems raised in earlier busing decisions.[14] Federal District Court Judge James McMillan of Charlotte, North Carolina, had rendered a decision in Swann that supported racial balancing. Judge McMillan's decision necessitated busing school children in metropolitan Charlotte and Mecklenburg County.[15]

When the Supreme Court granted certiorari in the Swann case, school districts everywhere waited anxiously for its decision; and while the case was under consideration, the federal courts operated without definite guidance on the extent to which busing could be used to effect desegregation. The Supreme Court Justices noted that bus transportation had been

an "integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school."[16] The Court followed this rationale to uphold the concept of busing to achieve racial balance in the schools.

Reaction to the Supreme Court's ruling in Swann came quickly, and those against the remedy proposed a number of alternate means for limiting or eliminating busing. Therefore, soon after the Swann decision came the inevitable; metropolitan school desegregation suits seeking to eliminate desegregation by crossing school district boundaries but would also increase court-ordered transportation of students. Keyes v. School District No. 1,[17] Milliken v. Bradley, [18] Tallulah Morgan et al. v. John J. Kerrigan et al, [19] represent a few of the more controversial cases involving school busing. The Swann decision, was the last unanimous Supreme Court decision in the area of segregation, raised far more questions than it solved.

Future

The writer contends that Court decisions can serve as a guide for determining whether access to equal educational opportunity will become a reality for all Americans two decades hence. Past Court decisions in general, tend to support the future. Thus, we can expect segregation to continue as one of the nations more pressing problems. "Tenuous as the art of predicting the future is, this speculation appears relatively assured, if the slow judicial momentum so evident in recent court decisions represent the trend of the future."[20]

Pasadena City Board of Education v. Spangler[21] represents one such incremental move in the trend. In Spangler, the Supreme Court held that the District Court had exceeded its authority in refusing to modify a desegregation order that required annual readjustments of student attendance zones in response to demographic shifts.

In 1970, the District Court concluded that the Pasadena school system was unconstitutionally segregated,[22] and it ordered the system to submit a desegregation plan. Pasadena included in its desegregation plan the understanding that no school would have the majority of any minority students. Although the school system initially complied with the Court's requirement to assign students to schools neutrally, in 1974, the school board sought relief from the no majority requirement. The District Court denied relief because some of the schools in the district had already violated the requirement. On appeal, the Ninth Circuit Court of Appeals held the annual readjustments of student attendance zones to be unacceptable. But, the Ninth Circuit Court went on to affirm the District Court's denial of relief. It noted these two points: (1) The school system had only briefly complied with the no majority requirement after implementating the desegregation plan; and (2) School board had been generally the uncooperative. The Supreme Court, ultimately, reversed the District Court, holding it had exceeded its authority by requiring attendance zones adjustments as an indication of compliance with the no majority requirement. According to the Court, a modification of the requirement should have been grated.[23] The case was remanded to the Court of Appeals for reconsideration.

In effect the Supreme Court, Spangler, ruled that the District Court had gone beyond what the Court had approved in Swann. The point is, the Court saw its order not as a beginning in the process of shaping a remedy, which Swann indicated would be appropriate, but as an inflexible requirement to be applied each year within the attendance zone of each school. In Swann, the Court had disallowed orders that required annual adjustments of the racial composition of the student population if those adjustments extended beyond the point at which "the affirmative duty to desegregate has been accomplished and racial imbalance through official action is eliminated from the system."[24] Finally, the Court stated that once a unitary system had been achieved, further judicial intervention would be warranted only if deliberate action by state officials had a negative effect on the racial composition of the school.[25]

In Spangler and in its later interpretations of Swann, the Supreme Court held that successful implementation of a racially neutral attendance pattern discharged the affirmative duty of the school board with regard to attendance zones.[26] In the dissenting opinion, Justices Brennan and Marshall rejected the idea that the District Court had exceeded its authority. According to the dissenters, Swann's denial of a year-by-year review attendance zone should take effect only upon achievement of a "fully desegregated school system."[27] The dissent (and a concurring opinion written by Justice) that the court's majority opinion of Swann, allowing a short term compliance period to satisfy the school board's affirmative duty, might well adversely affect a school.[28] The dissent further argued that in limiting the District Court's ability to fashion

equitable remedies might well hinder the elimination of all state-imposed segregation.[29]

The Supreme Court decision in Spangler increased the constraints on the remedial powers of district courts in school desegregation cases. The majority holding in Spangler is "process-oriented" in its emphasis on the achievement of a "racially neutral system of student assignment."[30] The holding is "result-oriented" to the extent that any initial compliance may be redemially sufficient. In the past, advocates of integration supported the "result-oriented"approach because consideration of past discrimination gives courts greater latitude in fashioning remedies.

If the Spangler decision has any meaning for the future, it is that school districts in compliance one day, may be allowed to resegregate when demographic shifts are not attributable to the actions of school officials. Such a trend suggests that once desegregation of students is achieved a school system discrimination attributable to official action is eliminated, school officials may no longer be required to make yearly alterations in student assignment plans in order to maintain a strict numerical ratio of majority and minority students.

Another case bearing on this question of official discrimination, Washington v. Davis,[31] does not, however, address the issue of school desegregation, per se. As part of its selection procedure for police academy recruits, the City of Washington, D. C., administered "Test 21," a test which was also used generally by the federal civil service to test verbal ability. It was shown that a passing score on the test correlated positively with successful completion of the course of study at the

police academy. But no positive correlation between a passing score on the test and the quality of an applicant's on-the-job performance was not shown. The Washington Police Department was actively seeking black recruits, and it had raised the percentage of black recruits to a level roughly equal to the percentage of twenty to twenty-nine year old blacks in the area from which personnel were drawn.

The facts in Washington v. Davis did not require that the court identify what particular factors must be present to show an intent to discriminate. But Justice White, writing the majority opinion for the Supreme Court noted that the central question in the case was whether the defendants had purposefully sought to disqualify black applicants. Justice White acknowledged that in some instances, a dearth of blacks "may warrant an inference of purposeful discrimination or, at least, a shifting of the burden of proff to the state to explain such absence in racially neutral terms."But, he continued" this inquiry would still seem to focus upon the subjective state of mind of the public officials."[32] Justice Stevens raised a number of other questions:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally, the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker, or conversely, to invalidate other legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process.[33]

Is Stevens suggesting that the requisite "intent" should encompass more than a desire to cause certain results, even though the feared result is substantially certain to ensue? After Davis, the Court's message is inescapable: To characterize the differing effects of racially neutral state practices as "discrimination for equal protection purposes," there must be a finding of intent to cause the discriminatory effect. Thus, a test that is racially neutral on its face, and is administered without racially discriminatory action or intent, and is reasonably related to a legitimate purpose, is constitutional.

Even if foreseeability is a factor from which one can draw an inference of discriminatory intent, foreseeability of effect does not in itself seem sufficient to make out a case of de jure segregation.

For a subsequent Supreme Court decision which was vacated in light of Washington v. Davis, see Austin Independent School District v. United States.[34] The Court, relying on Davis remanded this case to the Court of Appeals for consideration in light of its decision in the Davis decision. In Austin, the Court agreed that there would be no need to address the issue of remedy if the Court of Appeals found that there has been no constitutional violation. The Supreme Court speculated on whether the Court of Appeals might have erred by impugning school officials more than the evidence justified and in ordering a desegregation plan far exceeding in scope any identifiable violations of constitutional rights.

The Court went on to state that the principal cause of racial and ethnic imbalance across the country lay in the imbalance in residential patterns. Such patterns, the Court pointed out, are typically beyond the control of school authorities. Economic pressures and voluntary

preferences are the primary determinants of residential patterns.

As matters now stand, pupil transportation is apparently permissible only when the evidence supports a finding that the extent of integration to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. A remedy simply is not equitable if it is disproportionate to the wrong. The Supreme Court elucidated this point in Dayton Board of Education v. Brinkman.[35]

In the Brinkman case the District Court found that the Dayton School Board had engaged in racial discrimination in the operation of the city's schools. The Court based its findings on three factors: (1) a substantial racial imbalance among the student bodies throughout the system; (2) the school board's use of optional high school attendance zones, which had a segregative effect; and (3) the school board's rescinding of a prior board's resolution acknowledging its own role in racial segregation and calling for remedial measures. The District Court, at the insistence of the Court of Appeals, ordered a system-wide remedy.

The duty of both the District Court and the Court of Appeals in this case was to determine whether there was any action in the conduct of the school board that was intended to, and in fact, did discriminate against the staff and student body.[36] The point is, the remedy must be designed to redress the perniciousness that lay between intention and result. Only if there has been a system-wide impact would there by a system-wide remedy.

Thus, the Supreme Court remanded Brinkman so the District Court could establish whether other segregative acts of the school board could be established sufficient to warrant a system-wide remedy or whether a more

limited order should be formulated. Pending a new determination, the District Court's present plan is to take effect. In December, 1977, a federal judge ruled that the plaintiff in the Brinkman case had not proven intentional racial segregation on the part of the Dayton Schools at least not to the extent the Supreme Court said was required when it sent the case back to the lower court in June. After lawyers for the NAACP asked the Court of Appeals to keep the city's desegregation in effect, the Court ruled that Dayton School officials must keep its desegregation plan in effect until it rules on the case for the second time.

In summary, the Supreme Court rulings in Spangler, Davis, Austin, and Dayton can and will be interpreted by many as a retreat from the initial Brown decision. This interpretation is understandable when one considers the confusion and questions that have resulted from the Court's holdings in these cases. But it is possible, too, to see these cases as small steps forward taken by an essentially conservative, judicially passive Court.

Conclusion

> A nation has a choice. It choses itself at fateful forks in the road by turning left or right, by giving up something or taking something - - and in giving up and the taking, in the deciding and not deciding, the nation becomes. And ever afterwards, the nation and the people are defined by the fork and by the decision that was not made there. For the decision, once made, engraves itself into the landscape; engraves itself into things, into institutions; nerves, muscles, tendons....[37]

Inferences and conclusions about such subjective issues as school desegregation must, of course, be made within limitations; but at the same time the available data about desegregation demands serious, extended study. The author cannot say for sure that sustained pressure

by the courts will increase support for school desegregation. But it does seem reasonable to argue that, since Brown I, the nation's attitudinal change has been significant. This change is documented by the National Opinion Research Center's published results in the December, 1971, issue of Scientific American. In the realm of public education, the survey indicated that in 1970, seventy-five percent of all Americans said they favored integration, compared to only thirty percent in 1942. Only two percent of the whites in the South said they favored school integration in 1942; in 1956, fourteen percent said they favored it; in 1970, almost half of them said they favored it.

Furthermore, the assertion that "mandatory busing has contributed to the racial and economic segregation of our cities on a scale undreamed of in 1954,"[38] is oversimplistic and fails to take into consideration the numerous other factors that have influenced the movement of citizens from the cities. Finally, to assume that educators can solve the problems inherent in our society by themselves is to assume too much.

If a less troubled educational period is to emerge, it must be assisted by professional people and communities of good will guided by the basic social mandates of the Constitution and the Brown decisions.[39]

NOTES

1. David L. Kirp, "Race, Politics and the Courts: School Desegregation in San Francisco," Harvard Educational Review, 46, November, 1976, p.572.
2. J. Skelly Wright, "Are The Courts Abandoning The Cities," Journal of Law and Education, 4, January, 1975, p.218.
3. Robert Green, Eugenia Smith, John H. Schweitzer, "Busing and the Multiracial Classroom," Phi Delta Kappan, May , 1972, p.543.
4. 347 U.S. 483 (1954)
5. Green supra note 3 at 543
6. 349 U.S. 294 (1955)
7. 153 U.S. 537 (1896)
8. 339 U. S. 629 (1949)
9. Daniel, Bible (Kings James Version) 5:25-8, each of the Aramaic words indicated that the days of the Babylonian Kingdom were found lacking and would soon fall.
10. Brown V. Board of Education of Topeka, 98F. Supp. 797 (D. Kan. 1951), Briggs v. Elliott, 103 F. Supp. 920 (E.D.S.C., 1952); Davis v. County School Board, 103 F. supp. 337 (E.D.Va. 1952). Gebhart v. Belton, 91 A 2d. 137 (1952).
11. 347 U. S. at 495.
12. 391 U. S. 438 (1968)
13. Id. at 430
14. Swann v. Charlotte-Mecklenburg Board of Education, 399 U. S. 926 (1970)
15. 311 F. Supp. 265, 268 (W.D.N.C.) rev'd in part, 431, F.2d 138 (4th Cir. 1970) district court opinion reinstated, 40 2 U.S. (1971).
16. 413 U. S. 189 (1973)
17. 418 U. S. 717 (1974)
18. 379 F. Supp. 410 (1974)
19. Thomas Fraser Pettigrew, "Exploring the Future: Race Relations in the 21st Century, "Journal of Law and Education, 4, January, 1975, p.39.
20. 427 U.S. 425 (1976)
21. Id. at 427.
22. Id. at 438.
23. 402 U. S. 31-32 (1971)
24. Id. at 32
25. 427 U.S. at 436-437
26. Id. at 443.
27. Id. at 442-43
28. Id. at 444.
29. Id. at 437

30. 96 S. Ct. 2040 (1976)

31. 426 U. S. 229 (1976)

32. Id. at 253

33. 45 U.S.L.W. 3413 (1976)

34. 45 U.S.L.W. 4910 (1977)

35. See Washington v. Davis

36. Jerone Bennett, Jr., The Shaping of Black America, (Chicago: Johnson Publishing Company, Inc., 1975) p. 61.

37. Louis Rubin, ed., The Future of Education: Perspectives on Tomorrow's Schooling, (Boston, Allyn and Bacon, 1975) pp.107-11.

38. David G. Carter, The Case Against Separate Schools, The Clearing House, November, 1977, p. 129.